HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 1139 (S/S) year 2003

Shyam Lal S/o Naga Ram

Versus

State of Uttaranchal and others.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision. 31.10.2003

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Writ petition No. 1139 (S/S) 2003

Shyam Lal s/o Naga Ram ---- Petitioner

Vs.

State of Uttaranchal and others. ---- Respondents.

Mr. S.S. Yadav, counsel for the petitioner.
Mr. B.D. Kandpal, Standing Counsel for the respondents.

Dated: October 31, 2003:

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for the issue of a writ, order direction in the nature of certiorari quashing the impugned order/notice dated 30.05.2003 (annexure-3 to the writ petition) by which the petitioner has been directed to retire in the forenoon of 31st October 2003.

Brief facts given rise to the writ petition are that the petitioner was appointed on 17th October 1972 on the post of Operator in work charge establishment, Irrigation Department, Dakpatahar. At the time of appointment, the petitioner was working on the post of Pump Operator.

Petitioner has stated in paragraph-4 of the writ petition that in the year 1979 at the time of revised pay scale/promotional scale, there was a requirement of providing date of birth certificate and the same was required very urgently as the process of pay fixation was going to be held. The petitioner, therefore, has rushed to Gram Pradhan of his village who has issued the birth certificate in favour of the petitioner showing the date of birth as 03.10.1943.

According to the case of the petitioner, prior to 1979, the service-book was not prepared and, as such, the date of birth was not mentioned in the service book. On coming to know the aforesaid defect in the service record, the petitioner has moved an application on 08th March 2002 and 27th July 2002 praying for the correction in the date of birth. Again the petitioner has moved an application on 6th May 2003 regarding correction on the date of birth annexing the

certificate obtained from Primary Education as having passed class-V. The date of birth in the School Leaving Certificate was shown as 5th July 1947.

In the meantime, on reaching the age of superannuation the notice was sent 30.05.2003, which came to the knowledge of petitioner on 11th June 2003 mentioning the date of birth as 3rd October 1943.

The petitioner has filed the present writ petition on 26th September 2003 and His Lordship Hon'ble Mr. Justice P.C. Verma was pleased to grant three weeks' time to Standing Counsel to file counter affidavit and direction was made to list the writ petition thereafter. The petitioner has filed a fresh stay application No. 9833 of 2003 stating therein that since he is going to retire on 31st October 2003. Therefore, the writ petition and the stay matter may be considered.

Heard Sri S.S. Yadav, learned counsel for the petitioner and Sri B.D. Kandpal learned counsel for the respondents. Both the parties have agreed that since the controversy in the stay matter and in the writ petition are common, therefore, the writ petition itself may be decided finally.

A perusal of the record of the petition shows that the petitioner has joined his services in the Irrigation Department in the year 1972 and the service record was prepared in the year 1979. At the time of recording entry of date of birth in the service book, it appears that the petitioner has not produced the School Leaving Certificate where the date of birth has been mentioned as 5th July, 1947. The School Leaving Certificate also shows that the petitioner has taken his education till 30th June 1957. The certificate has been issued on 24th August 2002.

The petitioner, thereafter, has started making representation to the authorities right from 2002. In the representation dated 12 July 2003 there was a endorsement to the following effect:-

"अधिशाषी अभियंता डी0सी0डी0 डाकपत्थरः– रेखांकित के सम्बन्ध में तीन दिन के भीतर स्पष्ट करें कि किन कारणों से अभी तक आदेशों की पालना नहीं की गई है"

The petitioner has also produced the copy of the seniority list where at serial No. 28, the petitioner has been shown as having passed 8th Class. The said entry is quoted below:-

28. श्याम लाल नागेराम 3.10.43 मु0 नगर पिछड़ी ट्यूबवेल आ0 8 पास 17.10.72

According to the petitioner, at the time of the entry in the service record regarding the date of birth, the petitioner could not get the opportunity of producing the School Leaving Certificate.

Rule-2 of the U.P. Recruitment to services (Determination of Date of Birth) Rules, 1974 reads as under:-

"2. Determination of correct date of birth or age.- The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examinations aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation of his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or representation shall be entertained for correction of such date of age in any circumstances whatsoever."

On the other hand learned Standing Counsel appearing for the respondents has relied upon the various judgments of the Hon'ble Supreme Court where the Apex Court has held that correction of the date of birth cannot be corrected at belated stage. The observations of the Apex Court reported in Union of India Vs. Ram Suia Sharma 1996 Supreme Court Cases (L&S) 604 is quoted below:-

"The controversy raised in this appeal is no longer res integra. In a series of judgments, this Court has held that a court or tribunal at the belated stage cannot entertain a claim for the correction of the date of birth duly entered in the service records. Admittedly, the respondent had joined the service on 16.12.1962. After, 25 years, he woke up and claimed that his correct date of birth is 2.1.1939 and not 16.12.1934. That claim was accepted by the Tribunal and it directed the Government to consider the correction. The direction is per se illegal.

Similar controversy came up for interpretation in AIR 1997 Supreme Court page-2452 State of Orissa and others. Vs. Ramanath

Patnaik where the Apex Court after relying upon the judgment reported in (1994) 6 SCC 302 has held as under:-

"3. The controversy is no longer res integra. This Court has considered the entire case low on this point in State of Tamil Nadu Vs. T.V. Venugopalan, (1994) 6 SCC 302: (1994) AIR SCW 3947). Therein, this Court has held thus (at p. 3950 of AIR SCW):

It is well known that the service record would be opened after the government servant enters the service and normally the entry in service record would be countersigned by the government servant. The date of birth as entered in the school record is the source of material for making entry in the service record.

4. when entry was made in the service record and when he was in service, he did not make any attempt to have the service record corrected. Therefore, any amount of evidence produced subsequently would be of no avail. The High Court, therefore, has committed manifest error of law in refusing to entertain the second appeal."

The Apex Court in State of U.P. Vs. Gulaichi (2003) 6 Supreme Court Cases 483 after relying upon the judgment of Union of India Vs. Harnam Singh (1993) 2 SCC 162 has held as under:-

"In the case of Union of India Vs. Harman Singh, the position in law as again reiterated and it was observed : (SCC p. 167, para 7).

7. A government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the government servant must do so without any unreasonable delay.

An application for correction of the date of birth should not be dealt with by the courts, Tribunals or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion forever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be

conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court of the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of the date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth in his service-book."

In Chief Medical Officer Vs. Khadeer Khadri JT 1995 (1) S.C. page 453 the Apex Court after relying upon Sub Rule 5 of Rule 2 of Andhra Pradesh Public Employees (Recording and Alteration of Date of Birth) Rules, 1984 has held as under:-

"The date of birth having been given and recorded in the service register as early in 1951 it was not a bona fide mistake. The respondent claimed that he discovered the mistake in 1991 that his dated of birth instead is July 15, 1934 but it was recorded as November 14, 1933. This is only a ruse to get over the bar of limitation to have the date of birth entered in the service record corrected. The rules prescribed the procedure for laying the application within three years from the date of entering into service. In 1976, executive instructions were issued for correction of date of birth which were replaced by statutory rules issued in 1984. The latter also prescribes the procedure. He did not avail of the opportunity when, twice, it was available to him to have it corrected. It would clearly show that subsequent belated attempt is not a bona fide one but to have the correction made to his advantage after the bar of limitation created by the rules."

In State of U.P. and others Vs. Sharada Prasad, the Division Bench of Allahabad High Court after relying on the judgment of Sri Bakshi Ram & others Vs. Sri Brij Lal, JT 1994 (5) SC 422 has held as under:-

"In the above backdrop, one will appreciate that the Rules have to be interpreted pragmatically and which further the cause of justice. We, therefore, lean in favour of an interpretation, which does not prohibit concerned authority from carrying out corrections

purely accidental and clerical in nature, which neither tend to alter the 'status' and corresponding obligations' between the parties. In other words, if the correction is only to remove an "obvious and apparent' accidental mistake/slip, apparent absurdity as a consequence of interpolation or forgery in record (which is required to straighten the records to bring in line with other material on record) then it is not a 'change' by 'correction' of a nature which in real sense brings change in long settled factual position otherwise proved on record.

The above reasoning finds support from the observation made in the case of Shree Nath (supra) wherein Court held that an employee cannot have his say to his advantage all the time; namely at the time of entry as well as at the time of reaching age of superannutation.

In the case of Sri Bakshi Ram & others Vs. Shri Brij Lal , JT 1994 (5) SC 422, Apex Court held that in equity a person seeking benefit of certain bundle of facts which permitted a transaction (namely entry in service cannot be subsequently permitted to escape from the disadvantage flowing from same transaction and the affects, if any, flowing from the same. Equity does not permit a party to take stand-Heads I win, fails you loose'. Law, which is nothing but logic, has to promote justice and ensure that no party is enriched at the cost of other on technicalities If law by taking unfair stand. Similar view taken by learned Single judge in (1997) 1 E.S.C. 274 (All) (para 16), Sriram Vs. State of U.P. and others."

Learned Counsel for the petitioner has relied upon the judgment of Secretary and Commissioner, Home Department and other Vs. R. Kirubakaran reported in 1994 Supp (1) Supreme Court Cases 155 where the Apex Court has relied upon the judgment of Union of India Vs. Harnam Singh to the following effect:-

"A government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the government servant must do so without any unreasonable delay."

As will appear from the aforesaid judgment of the Apex Court that it is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as date from the one earlier recorded.

From time to time the petitioner has represented to the authorities and the representation of the petitioner was also decided on

1st October 2002 thereafter the notice was sent on 30th May 2003 retiring the petitioner from the forenoon of 31st October 2003.

In view of the law laid down by the Apex Court, no interference under Article 226 of the Constitution of India can be made in the notice dated 30th May 2003 retiring the petitioner from forenoon of 31st October 2003.

In view of the aforesaid findings I find no infirmity in the notice dated 30th May 2003 retiring the petitioner w.e.f. 31st October 2003.

However, the aforesaid order will not preclude the respondent authorities, to correct the accidental slip or omission in recording the date of birth.

Subject to the aforesaid observations, the writ petition is dismissed. No order as to costs.

(Rajesh Tandon, J.)

NCM: